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ABSTRACT

An introduction to a projected collection of essays on law and governance, this paper traces the reasons for and issues in increased federal control of education and lays down the format of the forthcoming collection. The author notes that, although the problems of increased bureaucratic involvement have not been so dramatic in education as elsewhere, there are important parallels between problems in other fields of regulation and those of education, including loss of local control, debilitating expense, inflexibility, and inefficiency. However, it is also observed that the problems in deregulation may be as severe as those in overregulation because organized interests may find it easier to influence decisions and because federal regulation of schools is not so autocratic as is commonly supposed. Choosing the right balance of local and federal control in order to ensure the claim of the poor in public education is presented as the prime issue in the regulation of education. The volume of essays will be divided between issues of regulation, which involve intragovernmental control, and those of legislation, which affect rights and establish whole systems of rulemaking bodies. Each of the two main sections will be further divided into four topics: the origins of governmental involvement in education, the general issues in areas of control, illustrative examples, and future prospects in the era of the New Federalism. (JW)

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Policy Paper No. 83-C1

THE FOURTH R: READING, WRITING, 'RITHMETIC--AND RULES

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February 1983

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Abstract

During the past quarter century, the governance of American schools has been transformed. Spurred by the Brown desegregation decision of the Supreme Court, school policy has been centralized and legalized as the courts were put squarely in the education policy business. The Brown decision led a variety of other groups to seek to convert the unfairness they had suffered into constitutional wrongs. A concurrent development, the elaboration of procedural protections (that is, the right to formal review of official decisions) was another result of this legalization in education. Centralization of educational policy through regulation accompanied legalization, as Washington asserted greater authority over schooling in order to turn the aspirations of the Brown decision into functioning reality.

This essay, the introduction to a longer IFG volume on law and education, discusses the recent history of educational governance and points ahead to future policy courses. Legalization and centralization are discussed, with reference to more than a dozen essays on law and education which comprise the volume. It concludes by pointing out that what everyone seems to want is an educational system that is responsive to national concerns and local variability, attentive to the professional perceptions of educators and political preferences, and addresses other sets of wants, each of which contain a tension that is hard to maintain.

I

During the past quarter-century, the governance of American schools has been remade, even transformed. Local control of policy was the historic watchword--the "Battle Hymn of the Republic," as a state school administrator put it[1]--and that control was essentially political and professional, not legal, in character. Within local communities, dominance over decision making was uneasily shared by lay boards of education and educational professionals. Tussles over the distinction between questions of policy (the province of the governing board) and questions of practice (properly the terrain of the educators) were frequent events.[2] State departments of education generally did little more than distribute aid according to a legislatively specified formula and provide modest technical assistance. The federal impress on education was almost undetectable. As late as 1960, the national education budget amounted to just half a billion dollars, administered by an Office of Education lacking both the taste and the talent for leadership. Neither the state nor the federal courts played a significant part in shaping school affairs. Judges confined their attention to issues of liability for mishaps in the chemistry laboratory and to matters of form in school contracts. The more momentous decisions were for others to reach.[3]

Centralization and legalization mark the two most noteworthy changes in this system of governance, and it is to these interrelated developments that the essays in this volume speak. The Supreme Court's 1954 decision in Brown v. Board of Education[4] underlies both changes. Most obviously, Brown put the courts

centrally in the education policy business. Racial inequalities stemming from legally imposed segregation of students lay at the heart of the Court's concern, but the justices' opinion reached beyond race, potentially enveloping within the judicial net all questions of equity in public schooling. The Court in Brown spoke of the provision of education as the most critical function of state and local government, and wondered aloud whether any child deprived of adequate schooling could hope to succeed in life. This judicial language opened the door to a host of other rights-seekers. The handicapped, the non-English speaking, those living in poor school districts, and female students all saw in Brown the opportunity to convert the unfairness they suffered at the hands of politically-dominated and localist school systems into constitutional wrongs. They took advantage of that opportunity by flooding the courts with lawsuits.[5]

The elaboration of substantive rights embodies one element of legalization. The development of procedural protections--the right to formal review of official decisions--provides the other. Although English courts had insisted as early as the eighteenth century that a university student receive a hearing before being dismissed, that idea never took root in the United States, where protections accorded to students subject to school discipline compared unfavorably with those provided to pickpockets.[6] Like other government services, schooling was regarded as a privilege, not a right, and so could be denied at the discretion of responsible public officials. But in a series of 1960s decisions concerning welfare and public employment, the Supreme Court thoroughly savaged the distinction between rights and privileges. The extension of procedural protection to education was an obvious next step, taken by lower courts in the 1960s and subsequently affirmed by the Supreme Court in Goss v. Lopez.[7] Procedures originally developed in the context of criminal justice (concerning the right to notice, a statement of charges, an

impartial hearing officer, and the like) were adapted to the setting of the school. And although proceduralism was orighally regarded as the remedy for abuses of official sanctioning authority, it also became part of the arsenal of those seeking substantive rights. The handicapped in particular were able to obtain procedural protections of their entitlement to an "appropriate" education, first from the federal courts and subsequently from Congress. Legalization thus became not just a judicial norm but also part of the regulatory regime.[8]

As this last example suggests, legalization and centralization proceeded apace and sometimes in tandem. One reason why Washington asserted greater authority over schooling was to turn the aspirations of the Brown decision into a functioning reality, since on its own the judiciary could not impose its understanding of racial justice on recalcitrant Southern school districts.[9] Beginning with the passage of the Civil Rights Act in 1964, the extent of federal intervention into the racial practices of Southern school districts was so substantial as to constitute a second Reconstruction.[10] Nor could questions about race be hived off from broader issues of education, for racial concerns insinuate themselves into seemingly every aspect of a school system, from teacher recruitment to the system of elections for school board members, from extracurricular activities to ability grouping. Regulation in the name of racial justice thus leads to regulation more generally.

While race mattered greatly, Washington did not assume increased responsibility for education primarily to rid public schools of the taint of racism. A national government strongly committed to education as "the answer to all our national problems,"[11] particularly those problems having to do with the educational failure of poor children, sought a significant role in molding educational policy.[12]

Beginning in the mid-1960s, the poor and educationally disadvantaged, the handicapped, the limited-English-speaking, and other traditional have-not groups became a national interest. From less than a half-billion dollars in 1960, the federal education budget grew to 26 billion dollars in two decades.[13]

Centralization begat regulation. Washington did not merely raise and distribute funds, but instead sought to use scarce dollars to influence the course of educational policy, relying heavily on regulation to achieve its ends.[14] Money came with strings attached; and sometimes, as with bilingual education, requirements were laid on even when no funds were made available. The federal program rules fairly bristle with dos and don'ts: a thousand pages of regulations in 1977, as compared with just twelve pages a scant twelve years earlier, tells the tale. The federal strategy stressed compliance with federal standards which, as with compensatory education, were designed to assure that expenditures satisfy federal bookkeeping requirements,[15] or more ambitiously, as with bilingual education aid, that the substance of local programs matches Washington's expectations.

The new regulations were rooted in distrust of the motives and the capacity of local school officials: "We treated every state as if it were Mississippi," Congressman Albert Quie remarked. Early scandals concerning expenditures of compensatory education funds for such implausible items as carpeting and air-conditioning a superintendent's office and even a fire engine fueled this suspicion.[16] Regulation came increasingly to entail control, and supervision displaced the encouragement and assistance that had formed part of the initial federal strategy. At the state level, parallel bureaucracies sprung up to administer the federal programs as well as new state initiatives. Over time, these state officials grew to share Washington's belief in the necessity for

stressing compliance, as distinguished from assistance.[17] Regulation thus grew apace, at both the federal and state levels.

II

This volume both looks back over this recent governance history and points ahead to future policy courses. It appears at an apt moment in history. Just as the quarter-century since Brown marked a revolution in modes of education governance, the 1980s witness a counterrevolution in full swing. The Reagan administration, eager to return responsibility for education to the state and local levels, condemns the recent federal presence as officious intermeddling. Because Washington lacks both the competence to set requirements and the capacity to carry them out, the argument runs, it should only provide education support (at levels markedly lower than those previously fixed), leaving decision making to those with a more nuanced understanding of the issues. If the administration has its way, the Department of Education, which acquired cabinet status under President Carter, will be demoted, and federal funds will be distributed as a block grant which the states may spend as they please.

The increase in legalization has also slowed perceptibly if less dramatically. The Supreme Court has not extended the reach of Brown to recognize a new generation of would-be holders of rights, but instead has sought to rein in the scope of that opinion. In San Antonio Independent School District v. Rodriguez,[18] the Court upheld against constitutional attack a state school financing system which resulted in wide inequities among districts; in Milliken v. Bradley,[19] the justices severely constrained the possibility of yoking city and suburban districts to overcome segregation; and in Halderman v. Pennhurst State School and Hospital,[20] the Court narrowly construed the Education for All Handicapped Children Act, preserving the authority of states to institutionalize handicapped youngsters. While federal district courts have continued to recast school

district policies in an attempt to undo the deep-rooted impress of segregation, Congress in 1981 mounted a serious challenge to the judiciary's authority in this realm.

In the schools as well as in the courts, unhappiness with the idea of legalization is often heard. Imposing procedural requirements on disciplinary practice potentially undermines the fragile authority of those who teach and administer in the school, some argue.[21] The due process entitlements of handicapped youngsters are scored as too expensive, subject to abuse by well-off parents seeking a private education at public expense, and a source of tension between parents and teachers who instead should work in tandem on behalf of the child.[22]

All issues of policy, aside from those left to the market, may be defined in one of four ways: as suitably left to professional expertise, as properly the province of bureaucratic norms, as fit for resolution in the political arena, or as giving rise to legal rights.[23] This four-wheeled cart of policy is inherently subject to wobble and strain, since these different modes of definition press for different forms of policy resolution. That tension may best be regarded not as a cause for concern but as a measure of a healthy governance system. Trouble arises when one of these contending understandings assumes too great a dominance. Legalization and bureaucratic control (understood here as centralized authority) clearly counted for too little in the educational policy calculus prior to Brown, and the claims of have-nots consequently got short shift. Public education was at risk of failing in its nineteenth-century promise to establish a "single educational ladder"[24] that all might equally climb.

The critics of legalization and regulation present a different and dis-

quieting concern. Have rights-mindedness and rule-mindedness gone too far? Has the public school system been impaired by the loss of legitimacy that attends denial of authority to the policy and denial of respect to professional judgment? We need more fully to comprehend the working of legalization and regulation in order to sort through these criticisms.

III

Almost a century and a half ago, Alexis de Tocqueville noted the penchant of Americans for converting political issues into questions of law.[25] Like so many of Tocqueville's observations, this one has grown truer with time. The "legalization revolution" has been much remarked, variously to describe,[26] to celebrate,[27] or to condemn[28] the phenomenon. We are even said to suffer from "hyperlexis"--the disease of "too much law" that has "overloaded" all "legal circuits."[29]

There is a certain ahistorical quality to these comments. Henry Maine, writing of the displacement, several millenia ago, of status by contract as the basis of public relationships, was speaking of a legalization "revolution," even if he was not given to such rhetorical flourishes.[30] Pushing the clock back even further, one wonders how Hammurabi's Babylonian subjects responded to that first great codification of rights and responsibilities, eighteen centuries before the Christian era.

If legalization is not new, though, reliance on the courts and on court-like mechanisms to secure rights, in a system of decision committed to offering reasons for its conclusions, has become sufficiently important to be fairly described as a master trend of modern social change. Proposed explanations of this trend abound: the impoverishment of politics; the growth of bureaucratic organizations which deprive individuals of an active stake in decisions shaping their own lives; distrust--or more globally, delegitimation--of traditional

sources of authority, a growing lack of consensus concerning societal norms; the attenuation of community; the emergence of a sizable public law bar eager to litigate broad policy concerns; and the willingness of judges to hear complaints that earlier would have been dismissed as not fit for judicial review (or as just silly). Legalization turns out to be a classically overdetermined enterprise, whose root causes are as hard to specify as are those of modernization itself.[31]

The appeal of legalization in the context of education is easy to understand. Education has historically been treated as a "national religion,"[32] the promised panacea for all our social ills. Blacks, the poor, and immigrants have been particularly faithful parishioners, for education is seen as representing the royal road to economic security and inclusion in the political order. Yet, the repeated failure of education to make good on this promise breeds frustration; persisting inequality grows less and less acceptable. The institutions of schooling are themselves both visible (and hence handy targets) and vulnerable. The technology of education is weak, the boundaries of educational organizations are loose and poorly defended, and the system of school governance is fractious and fragile. Seeking vindication through law thus seems terribly important and readily accomplishable.

The promise of legalization is great. Reliance on rules betokens a principled enterprise, in which economic or political power count for far less than in other arenas.[33] Normative judgments of the good society embodied in the Fourteenth Amendment's commands to equal protection and procedural fairness become governing standards. The idea of rights gives pride of place to the fundamental claims of persons to equal concern and respect in the design of political institutions, counterbalancing the utilitarian tendency to balance

political interests and preferences.[34] That legal institutions rely on reasons supplied by the parties in public colloquy offers both a means to participate in decisions that affect one's life and a basis for review of decisions, hence a check on arbitrary official action.[35]

At a time when critics of legalization are more vociferous than defenders--a balance that the papers included in this volume reflect--it bears remarking that the promise of legalization has been greatly fulfilled. The history of America generally and of the public schools in particular may be told as a tale of progressive inclusion in the polity, and in that telling the forms and values of law have a central place.[36] The pathologies of legalization reflect the darker side of the aspiration. From means, rules may become ends in themselves, cut loose from the principled considerations that were their initial impetus. When this occurs, legalization degenerates into legalism.[37] To put the matter somewhat differently, the language of rights camouflages what are better phrased as political claims. The very idea of rights is diminished in stature when the mantle of law protects those whose injuries are slight or speculative, or affords too much protection for those whose most ambitious hopes should be tested in the political and economic markets. Legal reasoning sometimes fails to shed light on the task of organizational redesign, an essential element of suits involving institutional reform. Hearings themselves may merely harden antagonisms without reaching useful resolution.

In any area subject to legalization, such as education, both the strengths and the debilities of the phenomenon are evident. How might things be otherwise, given what we know about the inherently problematic nature of changing the ways public institutions do business? The useful policy question is not whether legalization is perfect but whether it represents a relative good, one which on

balance promotes openness of process and fairness and efficiency in outcome. That question invites a contingent response, for instance, diminishes the possibility of arbitrary action but may also undermine the very best decisions, for these inevitably rest on discretion. Whether the benefits of these procedures outweigh the costs turns on the frequency and the systemic consequences of exceptional and arbitrary decisions, factors which will vary both with the institution and the substantive concern. To take a somewhat different example: creating legal rights for those, such as the handicapped, who have been excluded from the educational system usefully jolts the enterprise but may also spark inefficiencies and resentments. Such prods, though needed from time to time, cannot be constantly applied without doing institutional damage. Perhaps political judgments and professional expertise should hold sway once basic rights (an admittedly fuzzy notion) have been assured.

Efforts to implement the norms of law offer an instructive reminder that the dream of a centralized and rationally governed society managed by the contemporary equivalent of Plato's philosopher-king, which some political theorists and some lawyers fondly contemplate, is doomed to failure. The most interesting question is whether, over time, the values that inform the law can become suffused with the routine behavior of schools and other large organizations in the society, genuinely part of the ongoing official culture.

IV

Government regulation, like legalization, is old news. Attempts by higher reaches of American government to influence the behavior of lower levels, whether through sanction or inducement--the working definition of regulation in education--form an indispensable part of a federalist system of government. Yet, to an even greater extent than with legalization, regulation has assumed new and more note-

worthy forms over time. Particularly since the 1960s, new (or newly perceived) mischiefs have spawned innovations in the forms of government control. While these undertakings extend well beyond education, they have influenced the mode of regulation in that domain, and so deserve attention.[38]

The new approach to regulation differs from earlier efforts in two salient respects: the substance of the rules, and the role of the state and local authorities in shaping and enforcing them. The entry and pricing policies of particular segments of the economy had been subject to public review since the establishment of the Interstate Commerce Commission in 1887. But, with a few exceptions--the Food and Drug Administration's efforts, for instance--non-market activities of firms were disciplined by the market and private litigation, not regulated by government. This system began to break down as firms' behavior came to appear at once more prone to hazard and less susceptible to the conventional mechanisms of control. Prompted by blatant and visible mishaps, ranging from outbreaks of botulism to Three Mile Island and the Love Canal, Washington has increasingly subjected worker safety, environmental hazard, hiring policies, product fitness, and the like to official rule. It is widely argued that the public "must have its own eyes and ears, an early warning system, and a corps of protectors free from the flaws of greed, miscalculation, and ignorance that made the market and private liability laws less than perfect deterrents."[39]

The old regulatory regime had emphasized cooperation, both between the federal regulatory agencies and regulated industries and between Washington and those state agencies with similar mandates. Cooperation, the critics of the old system declared, led not to a safer, cleaner, fairer world but only to the capture of the regulatory agencies by the regulated.[40] The enterprise of regulation was merely a symbolic activity of government, designed to keep the citizenry quiescent.[41]

Discretion resulted only in abuses of official power. The new stance is consequently more adversarial in nature. Regulation entails the strict enforcement of rules by a corps of inspectors. Discovery of a violation automatically means sanctions, not solicitation of promises to do better in the future.

Because Washington could not (or at least would not) on its own protect the populace from the hazards of toxic wastes and unsafe workplaces, many of the regulatory initiatives of the past two decades have conscripted state and local government support: by one count, thirty federal laws adopted between 1964 and 1978 reached out to involve lower levels of government.[42] In the past, federal and state agencies worked in tandem on matters of shared interest, the federal government respecting state and local priorities and political concerns. But this, too, has changed with the press for more effective regulation. Statutes ranging from the Occupational Safety and Health Act and the National Environmental Protection Act to the Wholesome Poultry Products Act effectively hand the states their marching orders, turning them into "little more than reluctant minions mandated to do the dirty work--to implement federal directives often distasteful at the local level."[43] A variety of sanctions may be imposed on resistant states, including direct legal orders, fund cutoffs in one program for noncompliance with the demands of another (the Highway Beautification Act, for instance, denied highway construction money to states that failed to remove billboards), requirements spanning a range of federal programs (as with rules concerning racial discrimination and environmental protection), and federal preemption of responsibilities long assumed by the states (policing workplace safety, for example). This approach to regulation dramatically alters the pattern of relationships between levels of government. It challenges "the very essence of federalism as a noncentralized system of separate legal juris-

dictions, and instead relies upon a unitary vision involving hierarchically related central and peripheral units."[44] The new regulation thus pushes federalism perilously close to federalization.

As even a cursory glance through the volumes of the Code of Federal Regulations reveals, rules seem to spawn more rules. External pressures provide part of the explanation. Newly galvanized interest groups and their allies in Congress, prone to characterize social harms "as violations of moral rights, automatically to be converted into protectable legal rights,"[45] have sought to impose government rule on previously uncharted private domains. The effect of this, as James Q. Wilson points out, is to give "formal bureaucratic recognition to the emergence of distinctive interests in a diversifying economy"[46] and, one might add, a diversifying society. The process of regulation itself encourages the tendency to plug loopholes, apparent evasions of existing rules, with new rules. And boundaries are hard to set when the substance of rules is as evanescent and open-ended as with civil rights concerns. The rule-making organizations play an active part in this expansion too, whether from an imperialist tendency to search out new worlds to conquer or, conversely, from a desire to minimize the risk of public embarrassment by covering their flanks.[47] As with the increasing use of the forms and instruments of law, government regulation seems an inevitable and essential element of a structurally complex society.

Yet, if regulation in some form seems here to stay, the particulars of regulation have caused no end of consternation. A decade or so ago, the widespread concern was to make regulation more effective by broadening its reach and deepening its impress. If the new generation of critics is right, that campaign succeeded all too well, for it is the excesses of regulation that now arouse most concern. The New York Times, that bellwether of centrist

sentiment, observed that:

> Local governments are feeling put upon by Washington. Each new day seems to bring some new directive from Congress, the courts or the bureaucrats: cities must make public buildings accessible to the handicapped, states must extend unemployment compensation to municipal and county workers, and on and on. The mandates are piling up so fast that liberal governors and mayors are enrolling in a cause once pressed only by archconservatives.[48]

Some of this unhappiness has merely to do with "the strains of propinquity,"[49] but other concerns are more serious. One worry speaks to the impact of regulation on political choices. The growth of regulation removes issues from democratic control, turning them over to bureaucrats who are only remotely and directly subject to outside check, thus producing "a government of cartels and clients."[50] Other objections have to do with how regulation works in practice. The new rules are held to be just too expensive: the 1983 Clear Water Act standards, for instance, may cost $120 billion to implement. Regulations are also scored as inflexible. Why, for instance, should Washington dictate the particulars of bilingual education?[51] The regulations are further said to be inattentive to the calculus of efficiency, ignoring nice calibrations of costs and benefits; inconsistent in interpretation across bureaus; too intrusive in specifying not only what goals localities must reach but exactly how they must behave; and ultimately ineffective. "The mounting paperwork and red tape, the mandated expenditures, the federal intrusions into local decision making (have not) reaped commensurate benefits in the quality of human life," their critics say.[52] Some alternate strategy--either less regulation of a very different strategy of regulation--is deemed in order.[53]

The regulatory history in education has been less dramatic in other fields. Although the federal government has supported education since the

Northwest Ordinance of 1784, which made federally-held lands available for local schools, that aid was supposed to come without strings. The 1931 report of the Advisory Commission on Education urged that this tradition be maintained. It was fine for Washington to support schools, the report declared, so long as the law "does not delegate to the Federal Government any control of the social purpose and specific processes of education."[54] While the New Deal set up numerous education programs, these left the state and local education establishments unthreatened. The federal effort was work- and welfare-oriented, a nominal spin-off of relief activities which did not compete with the mission of the schools. The very absence of a bureaucracy committed to pursuing an educational reform agenda assured that this undertaking would leave no immediate legacy.[55]

As already noted, the education initiatives of the 1960s were accompanied by a far more activist federal presence. But when compared with federal activities in, say, occupational safety, Washington's role has been more modest. Although the degree of discretion available to local school officials varies with the particulars of the program, educators have far more room to maneuver than their counterparts in private industry. There is a greater tendency to rely on school systems to generate their own processes of decision, rather than imposing a single approach. Punishments for violations of federal rules are less severe in character and less frequently meted out.

There are, however, parallels to be drawn between social regulation generally and regulation in education.[56] In education as elsewhere, critics charge, rulemakers have often ignored the cost consequences of their requirements. New burdens have been placed on states and localities, paying little heed to either the financial implications or the cost-effectiveness of these

rules: standards concerning the handicapped and the limited-English-speaking are singled out as prime offenders in this regard. The tendency to inflexibility is evident in Washington's habit of imposing national norms, rather than allowing states to adopt more nuanced approaches to a particular issue: in drafting procedures for resolving disputes over the appropriate education of the handicapped, for example, existing state laws aimed at the same result were disregarded. Although education regulations more typically mandate procedures than outcomes, the possibility that the costs of those procedures (measured both in out-of-pocket expenditures and lost time) may be unreasonable has gone unnoticed. Most important, this system of regulation is held to have generated a climate of mutual distrust, contributing to the demoralization of America's public schools.

These criticisms provoke demands for a massive deregulation of education, as if schooling and trucking were indistinguishable activities in terms of government's proper role.[57] Yet, for a number of critical reasons, that approach may misfire. For one thing, to the extent that regulation represents a response to the increasing complexity of managing education in this country, at all levels, deregulation won't help. Reducing the number and specificity of rules won't keep organized interests from pressing their views on government, nor will it simplify decision making. Indeed, fewer and more general regulations will increase ambiguity and heighten tensions. The problem of complexity which rules are intended to address won't disappear but will just emerge someplace else, as school officials struggle to adjust to a newly uncertain world.

For another thing, the critique oversimplifies the historical record. It ignores a critical distinction between rules advanced in the service of

redistributive programs, aimed at getting federal dollars to the have-nots, and rules accompanying grants designed to encourage school system development, as with aid to the gifted, vocational education, or impact aid. In terms of regulatory detail, differences between these types of programs are modest, but objections to rules that have concentrated on the redistributive programs are really just a politically palatable way of questioning whether the have-nots deserve priority treatment. If Washington is to interest itself in the plight of the educationally least well off, some prescriptive imposition may well be necessary.

The case for elaborate federal policing, even on behalf of the have-nots, may no longer be so compelling, however, because of the ways both Washington and lower-level officials have learned to manage their relationships. For its part, Washington is more inclined to use the standards of law as a level to negotiate and less habituated to imposing its will on lower reaches than is popularly supposed.[58] And over time, state and local administrators have increasingly linked the federal initiatives with their own priorities. As a result, there is much less tension between school officials and Washington bureaucrats than the demand for deregulation presupposes.[59] This historical learning offers yet another reason to temper the critique of education regulation: deregulation is, in this respect, a 1980s' solution to a 1970s' dilemma.

As with legalization, policy toward regulation concerns itself with the "'right' balance, or mix, between order and spontaneity, between rationality and impulsiveness."[60] The point is not that regulation in education poses no cause for concern, but rather that concern be properly focused on the form that regulation assumes. Washington should be less rule-minded and more subtle, supple, and flexible in its dealings with state and local officials, concerned

more with aiding them as they adapt federal norms to local exigencies. This approach differs from much of present official policy and past practice. If it prevails, regulation would have less to do with rule enforcement and more to do with strengthening the capacity of others to educate effectively.

Rule enforcement has its place, particularly in safeguarding the stake of the have-nots; but even here, it may be that past federal initiatives have afforded these claimants sufficient clout within school organizations to make continuing federal enforcement less vital. Concerning other types of educational policy, what is called for is the elaboration of a shift in the federal role that, informally, has already begun, from sanctioner to supporter. Washington can properly speak to the public purposes of education, specifying educational ends and not just processes. If it does so with clarity, it may help restore the legitimacy of a national role.[61] By stressing cooperative problem solving, rather than the command and control mode of regulation, the national government may also be able to "repersonalize responsibility with the regulated organization,"[62] enabling school personnel to embrace the obligation to treat the interests of the young as if they were identical to their own, rather than acting from fear of criticism or saction. Much regulation becomes self-regulation in such a world, with Washington offering information, aid and direction. Modesty, not policy abdication, is what is wanted.

V.

Except to the ideologue or the willful oversimplifier, the choice between more or fewer rules, more or less law, is necessarily a matter of degree. Such "how much" questions know no nice calibration. And the extent to which reliance on regulation or legalization is sensible will vary with the circumstances. One wants to know how the claimants have fared under the existing policy regime; whether the suggested alternative will really improve their lot--and with what

adverse consequences; and whether the capacity to coerce through law or regulation, a scarce resource, should be husbanded or expended in this instance. The right mix of policy strategies will differ for vocational education, racial discrimination, and the education of the handicapped. Moreover, the fact that the education system changes in response to policy ministration implies that strategies of external intervention, whether through regulation or law, do become outmoded. For that reason, it is unsurprising that the contributors to this volume reach different conclusions concerning the value of legalization and regulation in particular instances. It is the particulars that are crucial.

This volume distinguishes between issues of regulation, which concern efforts of one level of government to control the behavior of another level, and issues of legalization, which entail establishing a system of decision committed to rules, trafficking in rights rather than preferences or interests, and justifying outcomes with reasons. While this distinction is not hard and fast, the categories not rigid, the differences are nonetheless sufficient--and sufficiently familiar in the very different lines of inquiry that these two modes of decision have generated--to warrant maintaining the demarcation. Each section includes essays of four types: those looking at the origins of the phenomenon, those framing general analytical questions, illustrative examples of regulation and legalization, and prospective essays that discuss those two phenomena in the era of New Federalism.

These papers grew out of a faculty seminar on Law, Governance, and Schooling, sponsored by the Program in Law of the Institute for Research on Educational Finance and Governance, Stanford University. The seminar met regularly between 1980 and 1982. A number of temporary sojourners in

the Bay Area were pulled into the discussions, and their contributions, too, are represented here. The seminar has left its impress on the papers in terms of shared influences, ideas that transcend substantive specifics and disciplinary orientation. The papers do not form a neat and tidy whole. They do resonate in that analytic harmony which defines both the potential and the limits of much cross-disciplinary scholarship. The range of disciplines represented--law, politics, history, sociology, and economics--as well as the deliberate inclusion of contributions by scholars new to educational policy, assure that the papers have both a certain spriteliness and an unavoidable tentativeness. (In this context, one could wish for a social science Esperanto, to minimize the confusion deriving from different if overlapping scholarly vocabularies.)

Paula Fass introduces the discussion of regulation by asking why the federal government didn't take on significant responsibility for education in the New Deal. Her paper notes the essential elements of a significant federal role-notably, the institutionalization of national commitment to education and resolution of the question of racial equity--that speak not only to the New Deal but also to the new federalism.

The essays that follow offer different perspectives on the issue of regulation. Paul Berman looks at the securing of compliance rather than encouraging learning by local school districts. Robert Kagan discusses the fixation on unearthing "bad apple" miscreant school districts to the detriment of the good apples; other papers examine the creation of needless paperwork demands which divert administrators from their jobs (Eugene Bardach); and threats to the authority of teachers (William Muir). Anne Swidler and, differently, Richard Elmore discuss the pathologies of federal

regulation, including an excessive emphasis on uniformity. Counterpoised against these critiques is William Clune's defense of a federal role linked to national purposes.

Most of these papers emphasize the defects of present arrangements. Yet, they also recognize that regulation may sometimes be a good and needed thing--in securing financial accountability, for instance, or bringing about desegregation; that the present regulatory regime may be preferable to the politically likely alternatives; and that, as with paperwork or outsider participation in policy decisions, a course of reform is sounder than policy abdication at the national level. They propose strategies for mixing and matching regulatory approaches to suit the circumstances of the case, strategic intervention by central government, greater participation by constituents in bending the rules to their will, more collegial and less adversarial relationships, and greater delegation of responsibility to lower levels of government. When given the choice, these contributors would focus on particular programs, such as that of Guy Benveniste, to maintain this balance.

The discussion of legalization is introduced by two essays that place this phenomenon in its historical setting. David Tyack seeks to specify the changing uses to which legalization has been put over the past century, while Lawrence Friedman poses an analogous question in the specific settings of students' rights disputes. John Meyer and Deborah Rhode fix a context for legalization in its two different forms: as an influence on the internal decisions of an organization required to adhere to certain procedures of decision, and, more familiarly, as an elaboration of techniques for dispute resolution.

Rhode's paper notes that the line between legalism and politics blurs in the resolution of complex policy issues which entail not merely declarations of rights but also organizational change that gives substance to those rights. In contrasting strategies for change in San Francisco's schools, including a regulatory and a legalist approach, Doris Fine's paper serves as a reminder of the linkage between legalization and regulation and as a bridge between the parts of the book. The papers by David Neal and David Kirp and by Thomas Griffin and Donald Jensen point to increasing reliance on legal norms and forms in two widely differing settings: the education of the handicapped and decision making in a state education agency. Finally, the essay by Kirp and Jensen discusses what may happen in the next few years, when legal entitlements clash with the political move to reduce the federal role in education.

These essays identify tension in the system of governance, not panaceas. What is wanted turns out to be nothing less than a mode of decision making responsive at once to national concerns and local variability, attentive to professional perceptions and political preferences, sensitive to the rights of the worst-off, yet resistant to the rigidities that accompany the degeneration of legality into legalism, and able to foster both compliance to rules and organizational adaptiveness. Each of these sets of wants embodies a tension, a balance hard to maintain. The policy puzzle is compounded further by the fact that these wants <u>all</u> must be maintained in equipoise, for pathologies in one realm--too much or not enough responsiveness to local wish, for instance--threaten the others.

Changes in how schools are governed sometimes matter in and of themselves, for we regard fidelity to law or attentiveness to popular prefer-

ences as ends as well as means of policy. Yet, as John Dewey warned at the beginning of this century: "It is easy to fall into the habit of regarding the mechanics of school organization and administration (and politics) as something comparatively external and indifferent to educational ideals."[63] When how schools are run becomes an end in itself, policies get disconnected from outcomes, means from ends, and rules and structures from life in classrooms.

Governance reform also has a substantive aspiration: strengthening the schools' capacity to equip the young with those habits of mind needed to make sense of the contemporary world and to instill a commitment to the larger community, thus sustaining the public household. The nexus between the structure of education and the lives of children, taken up in a number of the papers,[64] seems at once plausible to intuit, devilishly difficult to grasp, and ultimately of deepest concern in framing proposals for reform. It stands as the next critical puzzle in assessing the impact of regulation and legalization on education.

Footnotes

1. Quoted in Jerome Murphy, "The Education Bureaucracies Implement Novel Policy: The Politics of Title I of ESEA, 1965-72," in Allan Sindler, ed., Politics and Policy in America (Boston: Little, Brown, 1973), p. 160.

2. Roscoe, Martin, Government and the Suburban School (Syracuse, N.Y.: Syracuse University Press, 1962), p. 89.

3. Compare David Tyack, "Toward a Social History of Law and Public Education," IFG Project Report No. 82-A7, April 1982.

4. 347 U.S. 483 (1954).

5. See David Kirp, "Law, Politics, and Equal Educational Opportunity: The Limits of Judicial Involvement," Harvard Educational Review, 47 (1977): 117. See generally David L. Kirp and Mark Yudof, Educational Policy and the Law (Berkeley: McCutchan, 1982), chaps. 5-7.

6. See Warren Seavey, "Dismissal of Students: 'Due Process,'" Harvard Law Review, 70 (1957): 1406-07; and Lawrence Friedman, "Limited Monarchy: The Rise and Fall of Student Rights," IFG Project Report No. 82-A25, September 1982.

7. 419 U.S. 565 (1975). See generally, David Kirp, "Proceduralism and Bureaucracy: Due Process in the School Setting," Stanford Law Review, 28 (1976): 841.

8. See David Neal and David Kirp, "The Allure of Legalization Reconsidered: The Case of Special Education," IFG Project Report No. 82-A27, January 1983.

9. See David Kirp, Just Schools: The Idea of Racial Equality in American Education (Berkeley: University of California Press, 1982), chap. 4.

10. See Gary Orfield, The Reconstruction of Southern Education (New York: John Wiley, 1969); and Beryl Radin, Implementation, Change, and the Federal Bureaucracy: School Desegregation Policy in HEW, 1964-1968 (New York: Teachers College Press, 1977).

11. Quoted in Henry Perkinson, The Imperfect Panacea: American Faith in Education, 1865-1965 (New York: Random House, 1968), p. i.

12. Compare Paula Fass, "The New Deal; Anticipating a Federal Education Policy," IFG Project Report No. 81-A13, July 1981.

13. See David Kirp, "Education: Can the Democrats Offer both Equity and Excellence?" The New Republic, March 31, 1982; and Michael Kirst, "Loss of Support for Public Secondary Schools: Some Causes and Solutions," Daedalus, 110 (1981): 45.

14. See Paul Berman, "From Compliance to Learning: Implementing Legally-Induced Reform," IFG Project Report No. 81-A20, December 1981.

15. Michael Kirst and Dick Jung, "The Utility of a Longitudinal Approach in Assessing Implementation: A Thirteen Year View of Title I, ESEA," Report 80-B18, Institute for Research on Educational Finance and Governance, Stanford University, 1980.

16. NAACP Legal Defense and Education Fund, Inc., Title I ESEA: Is It Helping Poor Children? (Washington, D.C.: NAACP LDEF, 1969).

17. Jerome Murphy, "The Paradox of State Government Reform," Public Interest, 64 (Summer 1981): 124; and Richard Elmore and Milbrey McLaughlin, "Strategic Choice in Federal Education Policy: The Compliance-Assistance Tradeoff," in Ann Lieberman and Milbrey McLaughlin, eds., Policy Making in Education, 81st Yearbook of the National Society for Study of Education (Chicago: University of Chicago Press, 1982).

18. 411 U.S. 1, 98 (1973).

19. 418 U.S. 717 (1974).

20. 101 S. Ct. 1531 (1981).

21. See William K. Muir, Jr., "Teachers' Regulation of the Classrooms," in this volume.

22. See e.g., Richard Weatherly, Reforming Special Education: Policy Implementation from State Level to Street Level (Cambridge: MIT Press, 1979); and Christine Hassell, "A Study of the Consequences of Excessive Legal Intervention in the Local Implementation of PL #94-142" Ph.D. dissertation, University of California at Berkeley, and San Francisco State University, 1981).

23. See David Kirp, "Professionalization as a Policy Choice: British Special Education in Comparative Perspective," World Politics, 34 (1982): 137.

24. Henry Barnard, in Henry Barnard on Education, ed. John S. Brubacher (New York: McGraw-Hill, 1931), p. 96, quoted in Arthur Bestor, Educational Wastelands: The Retreat from Learning in Our Public Schools (Urbana: University of Illinois Press, 1953), p. 26.

25. This section draws heavily on "The Ideas of Legalization," a presentation by Philip Selznick to the Berkeley-Stanford Faculty Seminar on Law, Governance, and Education, October 1980, and on a general discussion of the same topic by seminar members in January 1982.

26. See, e.g., Joel Grossman and Austin Sarat, "Litigation in the Federal Courts: A Comparative Perspective," Law and Society Review, 9 (1975): 321; and Lawrence Friedman, "The Six Million Dollar Man: Litigation and Rights Consciousness in Modern America," Maryland Law Review, 39 (1980): 661.

27. See, e.g., Earl Johnson, Justice and Reform (New York: Russell Sage Foundation, 1974); and Edgar S. Cahn and Jean Cahn, "The Way on Poverty: A Civilian Perspective," Yale Law Journal, 73 (1964): 1317.

28. See, e.g., Maurice Rosenberg, "Let's Everybody Litigate?" Texas Law Review, 50 (1972): 1349; and Henry Friendly, "Should We Be Turning Back the Law Flood?" Legal Times of Washington, October 8, 1979, p. 7.

29. Bayless Manning, "Hyperlexis: Our National Disease," Northwestern University Law Review, 71 (1977): 767.

30. Sir Henry Sumner Maine, Ancient Law (New York: Scribner's 1864).

31. For a useful discussion of the roots of legalization, see Richard Abel, "Redirecting Social Studies of Law," Law and Society Review, 14 (1980): 805.

32. Henry Steele Commager, The American Mind (New Haven: Yale University Press, 1950), p. 10. See also Robert Wiebe, "The Social Functions of Public Education," American Quarterly, 21 (1969); 147.

33. See, e.g., Ronald Dworkin, Taking Rights Seriously (Cambridge: Harvard University Press, 1976).

34. See, e.g., Kenneth Karst, "Foreword: Equal Citizenship Under the Fourteenth Amendment," Harvard Law Review, 91 (1977): 1.

35. See, e.g., Owen Fiss, "Foreword: The Forms of Justice," Harvard Law Review, 93 (1979): 1 and 56-57.

36. See generally Kirp, Just Schools.

37. See Judith Shklar, Legalism (Cambridge: Harvard University Press, 1964).

38. See generally James Q. Wilson, ed., The Politics of Regulation (New York: Basic Books, 1980); and Robert Rabin, ed., Perspective on the Administrative Process (Boston: Little, Brown, 1979).

39. Eugene Bardach and Robert Kagan, Going by the Book: The Problem of Regulatory Unreasonableness (Philadelphia: Temple University Press, 1982), p.11.

40. See, e.g., Marver Bernstein, Regulating Business by Independent Commission (Princeton: Princeton University Press, 1955).

41. See, e.g., Murray Edelman, The Symbolic Uses of Politics (Urbana: University of Illinois Press, 1972).

42. David Beam, "Regulation--The Other Face of the New Federalism" (unpublished paper, 1981).

43. James Krier and Edmund Ursin, Pollution and Policy (Berkeley: University of California Press, 1981), p. 297.

44. Mel Dubnick and Alan Gitelson, "Nationalizing State Policies," in Jerome Hanus, ed., The Nationalization of State Government (Lexington, Kentucky: D. C. Heath, 1981), pp. 52 and 56. See generally Frank Thompson, Health Politics and the Bureaucracy (Cambridge: MIT Press, 1981); John Mendeloff, Regulating Safety (Cambridge: MIT Press, 1979); and Edward Koch, "The Mandate Millstone," Public Interest, 61 (Fall 1980): 42.

45. Bardach and Kagan, Going by the Book, p. 13.

46. James Q. Wilson, "The Rise of the Bureaucratic State," Public Interest, 41 (Fall 1975): 77.

47. Compare Anthony Downs, Inside Bureaucracy (Boston: Little, Brown, 1967) and William Niskanen, Bureaucracy and Representative Government (Chicago: Aldine, 1973) with Wilson, The Politics of Regulation, p. 359.

48. "Fighting Federal Mandates," New York Times, August 16, 1980, p. 20.

49. Morton Grodzin, The American System (Chicago: Rand McNally, 1966), p. 121.

50. Theodore Lowi, The End of Liberalism (New York: Norton, 1969). cf. Samuel Beer, "Federalism, Nationalism, and Democracy in America," American Political Science Review, 72 (1978): 9.

51. See, e.g., Rochelle Stanfield, "Are the Federal Bilingual Rules a Foot in the Schoolhouse Door?" National Journal, October 18, 1980, p. 1736.

52. Beam, "Regulation," p. 26.

53. See, e.g., Richard Elmore, "Backward Mapping: Implementation Research and Policy Decisions," in Walter Williams et. al., Studying Implementation (Chatham, N J.: Chatham House, 1982), p. 18.

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56. See generally, Robert Kagan, Regulating Business, Regulating Schools: The Problem of Regulatory Unreasonableness," IFG Project Report No. 81-A14, July 1981.

57. On trucking deregulation, see Dorothy Robyn, "The Politics of Trucking Deregulation" Ph.D. dissertation, School of Public Policy, University of California, Berkeley, 1982.

58. See, e.g., Paul Hill, Enforcement and Informal Pressure in the Management of Federal Categorical Programs in Education (Santa Monica, Calif.: Rand Corporation, 1979).

59. See, e.g., Barry Rabe and Paul Peterson, "Educational Policy Implementation: Are Block Grant Proposals Based on Out of Date Research?" (unpublished paper, 1982).

60. Eugene Bardach and Robert Kagan, "Conclusion: Responsibility and Accountability," in Bardach and Kagan, eds., Social Regulation (San Francisco: Institute of Contemporary Studies, 1982), pp. 343 and 357.

61. See Ann Swidler, "The Culture of Policy: Aggregate Versus Individualist Thinking About Regulation of Education," IFG Project Report No. 82-A13, June 1982.

62. Bardach and Kagan, Going by the Book, p. 311.

63. John Dewey, The Educational Situation (Chicago: University of Chicago Press, 1902), p. 22.

64. See, e.g., William K. Muir, Jr., "Teachers' Regulation of the Classrooms," and Richard Elmore, "Differential Treatment of States in Federal Education Regulation," both in this volume.